Galaxy Energy Technologies Sdn Bhd v Deputy Collector of Stamp Duty, Malaysia & Anor

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-01–400 OF 2009

ZALEHA ZAHARI, ABU SAMAH AND MOHD HISHAMUDIN JJCA

5 MAY 2011

Statutory Interpretation — Taxing statute — Strict construction — Section 57(f)(iii) and (iv) of the Stamp Act 1949 ('Act') — Appellant contracted to buy property — Stamp duty on transfer paid — Appellant unable to obtain financing to complete purchase — Contract terminated — Request for refund of stamp duty rejected — Whether appellant's case fell within s 57(f)(iv) of the Act — Whether intended purpose of instrument of transfer failed — Whether leave for appeal required as application for certiorari had value below RM250,000 attached

The appellant entered into a sale and purchase agreement to buy a property and paid RM78,600 as stamp duty on the instrument of transfer as assessed by the first respondent. The appellant was unable to obtain financing to complete the purchase. As a result the vendor terminated the agreement and forfeited the deposit paid. The appellant sought a refund of the stamp duty from the first respondent on the ground the transfer could not be completed due to its inability to settle the balance of the purchase price. The appellant relied on s 7(f)(iii) and/or (iv) of the Stamp Act 1949 ('the Act'). The first respondent rejected the application for refund on the ground that inability to obtain financing to pay the balance of the purchase price was not a ground under the Act for a refund of duty paid. When its appeal to the first respondent to reconsider the matter was also rejected, the appellant, with leave of court, filed for judicial review to obtain certiorari to quash the first respondent's decision and an order of mandamus to direct him to refund the stamp duty. The High Court dismissed the application for judicial review holding the appellant's inability to pay the balance purchase price was not an inability that fell within the scope of s 57(f)(iii) of the Act. The court held that the appellant also did not come under s 57(f)(iv) of the Act as the phrase 'any person' therein referred to any person other than the parties to the sale and purchase agreement. The appellant appealed the decision to the Court of Appeal. At the outset of the appeal hearing the court raised the issue of whether leave to appeal had been obtained under s 68(1) of the Courts of Judicature Act 1964 ('CJA') as the value of the subject matter of the claim, being the stamp duty amount of RM78,600, was less than the statutory RM250,000. Counsel for both sides submitted that leave was not required as the appeal was against the High Court's refusal to grant a writ of certiorari. In support of their submissions,

both counsel relied on the Court of Appeal's Practice Directions No 2 of 1996 and No 1 of 2008. A

Held, allowing the appeal with costs:

(1) (per **Abu Samah Nordin** and **Zaleha Zahari JJCA**) The appellant's inability to complete the sale due to its proven inability to obtain financing was an 'inability' within the meaning of s 57(f)(iv) of the Act (see para 24). B

(2) (per **Abu Samah Nordin** and **Zaleha Zahari** JJCA) Whether or not a person came within the meaning of word 'inability' in s 57(f)(iv) was a question of fact to be determined in the light of a particular case. One needed only to look at what s 57(f)(iv) said. Nothing was to be read in, nothing was to be implied. The only safe rule was to look at the words of the enactment and see what was the intention expressed by those words (see para 24). C D

(3) (per **Abu Samah Nordin** and **Zaleha Zahari JJCA**) The words 'any person' in s 57(f)(iv) was wide enough to include the party to the instrument, i.e. the appellant. There was no justification to interpret the words 'any person' as 'any other person' (see para 25). E

(4) (per **Abu Samah Nordin** and **Zaleha Zahari JCA**) The intended purpose of the memorandum of transfer, to transfer or vest the property in the purchaser, had failed due to the appellant's inability to pay the balance purchase price resulting in the termination of the agreement. There was therefore no conveyance on sale within the meaning of s 2 of the Act. The appellant's case fell squarely within s 57(f)(iv) and it was entitled to full refund of the stamp duty paid (see para 29). F

(5) (per **Mohd Hishamudin JCA** dissenting) The appeal was incompetent and dismissed with costs as leave of Court to Appeal had not been obtained pursuant to s 68(1) of the CJA. The subject matter of the appeal was the stamp duty of RM78,600, which was well below RM250,000. Section 68(1) did not provide for an exception in cases of certiorari (see para 43). G

(6) (per **Mohd Hishamudin JCA** dissenting) The two Practice Directions of the Court of Appeal, No 2 of 1996 and No 1 of 2008, were mere guidelines and should be interpreted as being subject to the CJA, an Act of Parliament, a higher law (see para 43). H

(7) (per **Mohd Hishamudin JCA** dissenting) The items pertaining to cases of certiorari in both the Practice Directions were meant to apply only to certiorari cases respecting subject-matters that had no value attached to them or those with values that could not be quantified (see para 44). I

(8) (per **Mohd Hishamudin JCA** dissenting) Although the present appeal concerned an application for a writ of certiorari, there was a value attached to the application, being the stamp duty value of RM78,600. This stamp duty amount was actually the subject-matter of the appeal. There was no valid reason to justify not applying to cases of certiorari the same principle that had been applied in cases of declaration such as *Lam Kong Co Ltd v Thong Guan Co Pte Ltd* [2000] 4 MLJ 1 and *Harcharan Singh s/o Sohan Singh v Ranjit Kaur d/o S Gean Singh* [2010] 2 MLJ 479 (see para 44).

[Bahasa Malaysia summary

Perayu telah memasuki perjanjian jual beli untuk membeli hartanah dan membayar RM78,600 sebagai duti setem ke atas jentera pindah milik sebagaimana yang ditaksirkan oleh responden. Perayu tidak dapat memperoleh pembiayaan untuk meneruskan belian. Akibatnya penjual telah menamatkan perjanjian itu dan merampas deposit yang telah dibayar. Perayu memohon bayaran balik duti setem daripada responden pertama atas alasan pindak milik tidak boleh diselesaikan kerana ia tidak mampu menyelesaikan baki harga belian. Perayu bergantung kepada s 57(f)(iii) dan/atau (iv) Akta Setem 1949 ('Akta tersebut'). Responden pertama yang telah menolak permohonan bayaran balik atas alasan tidak dapat memperoleh pembiayaan untuk membayar baki harga belian bukan alasan di bawah Akta tersebut untuk bayaran balik duti yang telah dibayar. Apabila rayuannya kepada responden pertama untuk mempertimbangkan sekali lagi perkara iu juga telah ditolak, perayu, dengan kebenaran mahkamah, telah memfailkan semakan kehakiman untuk memperoleh certiorari bagi membatalkan keputusan responden pertama dan perintah mandamus untuk mengarahkannya membayar balik duti setem. Mahkamah Tinggi telah menolak permohonan untuk semakan kehakiman dengan memutuskan ketidakmampuan perayu untuk membayar baki harga belian bukan satu ketidakmampuan yang terangkum dalam skop s 57(f)(iii) Akta tersebut. Mahkamah memutuskan perayu juga tidak terangkum bawah s 57(f)(iv) Akta tersebut kerana istilah 'any person' di sini merujuk kepada mana-mana orang selain daripada pihak-pihak kepada perjanjian jual beli. Perayu telah merayu terhadap keputusan Mahkamah Rayuan. Pada permulaan perbicaraan rayuan mahkamah telah menimbulkan isu sama ada kebenaran untuk merayu telah diperoleh di bawah s 68(1) Akta Mahkamah Kehakiman 1964 ('AMK') kerana nilai perkara yang dituntut iaitu duti setem berjumlah RM78,600, yang kurang daripada jumlah statutori RM250,000. Peguam bagi kedua-dua pihak berhujah bahawa kebenaran itu tidak diperlukan kerana rayuan itu adalah terhadap keengganan Mahkamah Tinggi memberikan writ certiorari. Bagi menyokong hujah mereka, kedua-dua peguam bergantung kepada Arahan Amalan Mahkamah Rayuan No 2 Tahun 1996 dan No 1 Tahun 2008.

Diputuskan, membenarkan rayuan dengan kos:

(1) (oleh **Abu Samah Nordin** dan **Zaleha Zahari HHMR**)

Ketidakmampuan perayu menyelesaikan jualan akibat daripada ketidakmampuannya yang terbukti untuk memperoleh pembiayaan adalah 'inability' dalam maksud s 57(f)(iv) Akta tersebut (lihat perenggan 24).

(2) (oleh **Abu Samah Nordin** dan **Zaleha Zahari HHMR**) Sama ada atau tidak seseorang itu terangkum dalam maksud perkataan 'inability' dalam s 57(f)(iv) adalah persoalan fakta yang perlu ditentukan berdasarkan kes tertentu itu. Seseorang itu perlu melihat kepada apa yang disebut dalam s 57(f)(iv). Tiada apa-apa patut dibaca dan ditafsirkan. Cara selamat adalah untuk melihat perkataan-perkataan enakmen dan lihat apakah niat yang dinyatakan oleh perkataan-perkataan tersebut (lihat perenggan 24).

(3) (oleh **Abu Samah Nordin** dan **Zaleha Zahari HHMR**) Perkataan-perkataan 'any person' dalam s 57(f)(i) adalah luas untuk merangkumi pihak kepada instrumen itu, iaitu perayu. Tiada justifikasi untuk mentafsirkan perkataan-perkataan 'any person' sebagai 'any other person' (lihat perenggan 25).

(4) (oleh **Abu Samah Nordin** dan **Zaleha Zahari HHMR**) Tujuan yang diniatkan dalam memorandum pindah milik, untuk memindah milik atau memberi hartanah kepada pembeli, telah gagal akibat daripada ketidakmampuan perayu untuk membayar baki harga belian sehingga mengakibatkan penamatan perjanjian. Oleh itu tiada pelaksanaan jualan dalam maksud s 2 Akta tersebut. Kes perayu terjatuh dalam s 57(f)(iv) dan ia berhak mendapat bayaran balik secara penuh duti setem yang telah dibayar (lihat perenggan 29).

(5) (oleh **Mohd Hishamudin HMR** menentang) Rayuan itu tidak kompeten dan telah ditolak dengan kos kerana kebenaran Mahkamah Rayuan tidak diperoleh menurut s 68(1) AMK. Perkara yang dirayukan adalah duti setem berjumlah RM78,600 yang sememangnya di bawah RM250,000. Seksyen 68(1) tidak memperuntukkan pengecualian dalam kes certiorari (lihat perenggan 43).

(6) (oleh **Mohd Hishamudin HMR** menentang) Dua Arahan Amalan Mahkamah Rayuan, No 2 Tahun 1996 and No 1 Tahun 2008, adalah hanya garis panduan dan patut ditafsir sebagai subjek AMK, Akta Parlimen, undang-undang lebih tinggi (lihat perenggan 43).

(7) (oleh **Mohd Hishamudin HMR** menentang) Item-item berkaitan kes-kes certiorari dalam kedua-dua Arahan Amalan bermaksud untuk hanya terpakai kepada kes-kes certiorari berkaitan perkara yang tiada nilai terletak padanya atau yang mempunyai nilai yang tidak boleh dikira (lihat perenggan 44).

(8) (oleh **Mohd Hishamudin HMR** menentang) Meskipun rayuan ini berkaitan permohonan untuk writ certiorari, terdapat nilai yang terletak pada permohonan, iaitu duti setem bernilai RM78,600 tersebut. Jumlah duti setem ini sebenarnya adalah perkara pokok rayuan tersebut. Tiada alasan munasabah untuk menjustifikasikan bahawa kes-kes certiorari tidak menggunakan pemakaian prinsip sama yang telah terpakai dalam kes-kes deklarasi seperti dalam kes *Lam Kong Co Ltd v Thong Guan Co Pte Ltd* [2000] 4 MLJ 1 dan *Harcharan Singh s/o Sohan Singh v Ranjit Kaur d/o S Gean Singh* [2010] 2 MLJ 479 (lihat perenggan 44).]

Notes

For cases on strict construction of taxing statute, see 11 *Mallal's Digest* (4th Ed, 2008 Reissue) paras 2002–2004.

Cases referred to

Cape Brandy Syndicate v IRC [1921] KBD 64 (refd)
Clifford v IRC [1896] 2 QB 187 (refd)
Coltness Iron Co v Black (1880–81) LR 6 App Cas 315 (refd)
Gurr v Scudds 11 Exch 190 (refd)
Harcharan Singh s/o Sohan Singh v Ranjit Kaur d/o S Gean Singh [2010] 2 MLJ 479, CA (refd)
Micklethwait, In re (1855) 11 Ex 452 (refd)
Lam Kong Co Ltd v Thong Guan Co Pte Ltd [2000] 4 MLJ 1, FC (refd)
Lim Teck Lee v The Commissioners of Stamps [1956] MLJ 135, CA (refd)
Littman v Barron (Inspector of Taxes) [1951] 2 All ER 393, CA (refd)
Navaradnam v Suppiah Chettiar [1973] 1 MLJ 173, FC (refd)
Partington v AG (1869) LR 4 HL 100 (refd)
Prudential Assurance Co v Inland Revenue Commissioners [1935] 1 KB 101 (refd)
Commissioners of Inland Revenue, The Same v J Lewis & Sons (1889) 23 QBD 579 (refd)
Shell Malaysia Trading Sdn Bhd v Collector of Stamp Duty, Penang [2009] 1 LNS 1769, CA (refd)

Legislation referred to

Companies Act1965 s 218(1)(g)(i)
Courts of Judicature Act 1964 s 68(1), (1)(a)
Rules of the High Court 1980 O 53, O 53 r 3
Stamp Act 1870 [UK] s 70
Stamp Act 1949 ss 2, 4(2), 36, 36(1), 39 39(1) 41, 57, 57(f)(iii), (iv), First Schedule, items 32(a), 49(a), 49(b)
Stamp Duties Management Act 1871 [UK] s 9(7), (7)(c), (7)(d)

Manmohan Kang (Charanjeet Kang with him) (Kang & Kang) for the appellant.

Ahmad Khairuddin Abdullah (Shafini Abdul Samad with him) (Senior Revenue Counsel, Inland Revenue Board, Malaysia) for the respondents.

Abu Samah JCA:

[1] The outcome of this appeal depends on the construction of ss 57(f)(iii) and/or (iv) of the Stamp Act 1949 ('the Act'). Section 57(f)(iii) and (iv) of the Act states:

> 57 Allowance for spoiled stamps —
>
> Subject to any rules which may be made uhder this Act and to the production of such evidence by statutory declaration or otherwise as the Collector may require, allowance shall be made by the Collector for stamps spoiled in the following cases:
>
> (f) the stamp used for any of the following instruments —
>
> (iii) an instrument executed by any party thereto, which has not been made use of for any purpose whatever, and which by reason of the inability or refusal of some necessary party to sign the same or to complete the transaction according to the instrument is incomplete and insufficient for the purpose for which it was intended;
>
> (iv) an instrument executed by any party thereto, which by reason of the inability Or refusal of any person to act under the same, or for want of registration within the time required by law, fails of the intended purpose or becomes void;

The proviso to s 57 of the Act is not an issue before us.

[2] We are told that so far there has been no reported case on the interpretation of this provision.

[3] Sections 57(f)(iii) and (iv) of the Act is somewhat similar to ss 9(7)(c) and (d) of the Stamp Duties Management Act 1891 (UK), which provides as follows:

> 9 Allowance for Spoiled Stamps — Subject to such regulations as the Commissioners may think proper to make, and to the production of such evidence by statutory declaration or otherwise as the Commissioners may require, allowance is to be made by the Commissioners for stamps spoiled in the cases hereinafter mentioned; (that is to say,)
>
> (7) The stamp used for any of the following instruments; that is to say,
>
> (c) An instrument executed by any party thereto which has not been made use of for any purpose whatever, and which by reason of the inability or refusal of some necessary party to sign the same or to complete the transaction according to the instrument, is incomplete and insufficient for the purpose for which it was intended:

A (d) An instrument executed by any party thereto, which by reason of the refusal of any person to act under the same, or for want of enrolment or registration within the time required by law, fails of the intended purpose or becomes void:

B **[4]** The proviso to s 9(7) of the UK Act is irrelevant for our purpose. The obvious difference is that the phrase 'by reason of the inability' which appears in s 57(f)(iv) of our Act does not appear in s 9(7)(d) of the English Act. This means that s 57(f)(iv) of the Act encompasses a wider scope than the provision in the English Act.

C

[5] In setting out the majority view it is necessary to set out the background facts which are as follows: On 17 January 2007 the appellant entered into a sale and purchase agreement ('the agreement') with Tennessee Builders Products D Sdn Bhd ('the vendor') to purchase a vacant industrial land held under HSD 109515 Lot PT 13293, Mukim Labu, Seremban, Negeri Sembilan ('the said land') at the purchase price of RM2,820,000. The appellant had on or before the execution of the agreement paid RM56,400 as earnest money and RM225,600 as deposit pursuant to the said agreement. Under cl 2.2 of the E agreement the balance of the purchase price shall be paid by the appellant to the vendor on or before the 'Payment Deadline', which is defined in cl 1.1.10 of the agreement as the deadline for the payment of the balance of purchase price by thepurchaser being the expiry date of the period of ninety (90) days from the unconditional date.

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[6] Under cl 2.5 of the agreement it is, inter alia, agreed that the purchaser's obligations in respect of payment of the balance of purchase price shall be deemed fulfilled upon the purchaser delivering to the vendor's solicitors on or before the payment deadline a letter of undertaking from the purchaser's G financiers to pay the balance of purchase price to the vendor.

[7] In pursuance of the said agreement the vendor and the appellant duly executed the transfer document in Form 14A on 18 July 2007. The collector, acting under s 36(1) of the Stamp Act 1949, assessed the duty chargeable on the H instrument of transfer at RM78,600 which was duly paid by the appellant on 12 September 2007.

[8] Unfortunately, the appellant had been unsuccessful in its applications to I obtain the financing to pay for the balance of the purchase price. All of its applications to three different banks were turned down. It was also unable to raise cash to pay for the balance purchase price. The appellant's solicitors, in their letter dated 24 July 2007 to the vendor's solicitors, explained that the appellant's applications were turned down as:

The Banks had a problem with the fact that the business of the Purchaser was connected to Iran. Our client was able to demonstrate that their business ventures were all carried out in Dubai but the Banks were still hesitant to grant them a loan

[9] On 27 September 2007 the vendor, acting through its solicitors, informed the appellant's solicitors that it was terminating the agreement due to the appellant's failure and/or neglect to comply with cll 2.2 and 2.3 of the agreement. The vendor also forfeited the deposit and the earnest money and requested that the memorandum of transfer and the original document of title be returned to it. The appellant did not dispute the said termination. It had no valid reason to challenge the termination although it stood to lose the earnest money and the deposit totalling RM282,000. It however sought a refund of the stamp duty paid pursuant to ss 57(f)(iii) and/or (iv) of the Act.

[10] By letter dated 13 February 2008 the appellant's solicitors applied to the collector, the first respondent herein, to revoke the notice of assessment on the stamp duty and to refund in full the amount of stamp duty paid on the instrument of transfer on the ground that the transfer could not be completed as the appellant did not have sufficient financial means to pay for the balance of the purchase price. All its efforts to obtain the necessary financing for the transaction were unsuccessful. The appellant also enclosed a copy of the agreement and the notice of termination of the said agreement, together with the application.

[11] On 24 March 2008 the collector rejected the appellant's application for the refund of the stamp duty paid on the ground that inability to obtain a source of financing to pay for the balance of the purchase price is not included as a ground under the Stamp Act 1949 for a refund of stamp duty. Paragraphs 2, 3 and 4 of the collector's letter to the appellant's solicitors said:

(2) Sila maklum mengikut Seksyen 57(f) Akta Setem 1949, bayaran balik duti setem boleh dipertimbangkan sekiranya sesuatu suratcara yang telah disetemkan tidak boleh digunapakai atau dilaksanakan untuk tujuan tertentu disebabkan terdapat kesilapan, kesalahan atau kekurangan pada suratcara tersebut atau ditolak pendaftarannya oleh mana-mana pihak berkuasa.

(3) Manakala Seksyen 58 Akta yang sama membenarkan bayaran balik duti setem ke atas suratcara yang dengan tidak sengaja disetemkan iaitu samada suratcara tersebut dikecualikan duti atau duti yang telah dibayar berlebihan dari sepatutnya.

(4) Memandangkan sebab-sebab pembeli tidak lagi mempunyai sumber kewangan yang mencukupi untuk melangsaikan baki harga belian tidak termasuk di bawah mana-mana peruntukan di atas maka permohonan untuk bayaran balik tidak dapat dipertimbangkan.

[12] The appellant's appeal to the collector by letter dated 9 April 2008 for reconsideration was rejected on the ground that it was not a fit and proper case to be considered under ss 57(f)(iii) or (iv) of the Act.

[13] With leave of the court, the appellant then filed an application for a judicial review under O 53 r 3 of the Rules of the High Court 1980 ('RHC') seeking for an order of certiorari to quash the decision of the collector and for an order of mandamus to direct the collector to refund the stamp duty paid on the memorandum of transfer.

[14] The appellant contended that it was entitled to a refund of the stamp duty under ss 57(f)(iii) and/or (iv) of the Act as there was no conveyance of the property to the appellant under the memorandum of transfer due to its inability to pay the balance of the purchase price resulting in the agreement being terminated by the vendor. The term 'conveyance on sale' is defined in s 2 of the Act as including 'every instrument whereby any property, upon the sale thereof is transferred to or vested in a purchaser or any other person on his behalf or by his direction'. Therefore a memorandum of transfer which is incapable of transferring to or vesting the property in the purchaser does not attract a stamp duty.

[15] Learned counsel of the respondent contended that the appellant's case did not fall within ss 57(f)(iii) or (iv) of the Act. He cited a passage at p 46 of Sergeant and Lims on *Stamp Duties and Capital Duty and Stamp Duty Reserve Tax* (9th Ed) where it is stated that allowance under ss 9(7)(c) or (d) of the UK Stamp Duties Management Act 1891 is somewhat limited. It would not for example apply to instruments which fail because of non-fulfilment of a condition precedent. It was submitted before the High Court that the word 'every person' in s 57(f)(iv) of the Act refers to the refusal or inability of a third party, ie any person other than the party to the agreement, a contention which found favour with the learned judge.

[16] The High Court dismissed the application for judicial review. It held that the appellant's inability to pay the balance purchase price resulting in the termination of the agreement was due to its inability to comply with a term of the contract, rather than inability to comply with a condition precedent. The High Court judge was of the view that such an inability did not fall within the scope of s 57(f)(iii) of the Act. As for s 57(f)(iv) of the Act the High Court held that the appellant did not come under the said provision as the word 'any person' in s 57(f)(iv) of the Act refers to any person other than the party to the agreement. Being dissatisfied, the appellant appealed to this court.

[17] There is only one issue before us. It concerns the construction of a taxing statute. It has long been established that a taxing statute is to be

construed strictly: see *Coltness Iron Co v Black* [1880–81] LR 6 App Cas 315 at p 330, *In Re Micklethwait* [1855] 11 Ex 452, *Cape Brandy Syndicate v IRC* [1921] KBD 64, *Partington v AG* [1869] LR 4 HL at 100. Rowlett J in *Cape Brandy Syndicate v IRC*, said: A

> It simply means that in a Taxing Act one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption as to tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used. B

The Taxing Act must state in clear and distinct terms. If there is any ambiguity it is to be resolved in favour of the taxpayer: *Commissioners of Inland Revenue v G Angus & Co, The Same v J Lewis & Sons* (1889) 23 QBD 579; *Gurr v Scudds* 11 Exch 190; *Clifford v IRC* [1896] 2 QB 187. C

[18] Hardship is not a factor for consideration. Lord Cairns in *Partington v AG* [1969] LR 4 (HL) at p 100 said: D

> If the person sought to be taxed comes within the letter of the law he must be taxed, however great the hardship may be to the judicial mind to be. On the other hand, if the crown seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however apparently within the spirit of law the case might otherwise appear to be. In other words, if there be admissible in any statute, what is called an equitable, construction, certainly such a construction is not admissible in a taxing statute where you can simply adhere to the words of the statute. E

[19] The cardinal principle of stamp duty is that stamp duty is chargeable on the instruments and not transactions. As Finley J in *Prudential Assurance Co v Inland Revenue Commissioners* [1935] 1 KB 101 said: F

> the rule which must not be forgotten—namely, that under the Stamp Act one stamps, not transactions or anything of that sort, but one stamps instrument. G

This principle is mirrored in s 4(2) of the Act.

[20] Taylor J in *Lim Teck Lee v The Commissioners of Stamps* [1956] MLJ 135 echoed a similar view: H

> The fundamental principle is this. The Stamp Act taxes instruments, not transactions. If there are two ways of carrying out a transaction and the parties are content with the simpler, they are entitled to carry it out in that way. Whatever instrument they in fact use must be stamped as what it actually is, on a true construction of the document alone but extraneous evidence may be adduced to show, for instance, whether an assignment, was made in pursuance of a sale or of a partition. I

[21] Let us now take a closer look at ss 57(f)(iii) and (iv) of the Act. On the facts before us, the appellant's case does not come within s 57(f)(iii) of the Act. The said memorandum of transfer is a complete document. It was duly executed by the parties thereto. The consideration for the transfer was also stated therein. So on the face of it, the memorandum of transfer was sufficient for the purpose for which it was intended.

[22] That leaves us with s 57(f)(iv) of the Act. Under s 57(f)(iv) of the Act, the collector shall, subject to any rules made thereunder and on the production of such evidence as he may require, make allowance for stamps spoiled in the following cases, namely, where the instrument executed by any party thereto is:

(a) by reason of the inability any person to act under it; or

(b) by refusal of any person to act under it; or

(c) for want of registration within the time required by law,

fails of the intended purpose or becomes void.

[23] Clearly, the appellant's case does not come under paras (b) and (c) above. But it is equally clear that the intended purpose of the memorandum of transfer, which is to transfer or vest the property in the purchaser had failed due the purchaser's inability to pay the balance of the purchase price. That triggers the operation of cl 9.1 of the agreement wherein the purchaser is contractually bound to return the said memorandum of transfer together with the original document of title to the vendor. The inability to complete the sale was not self-induced. It was simply due to the appellant's inability to obtain financing to pay the balance of the purchase price as all his applications had been turned down by three separate banks. He was also unable to raise cash to pay for the balance purchase price.

[24] The word 'inability' is not defined in the Act. In *Concise Oxford English Dictionary*, (11th Ed) the word 'inability' is defined as 'the state of being unable to do something'. *Collins Cobuild English Dictionary for Advanced Learners* simply explain the meaning of the word 'inability' as follows: 'If you refer to someone's inability to do something, you are referring to the fact that they are unable to do it.' So, whether a person comes within the meaning of the word 'inability' in s 57(f)(iv) of the Act or not is a question of fact, to be determined in the light of a particular case. The category of'inability' may well vary from one case to another. In our considered view the appellant's inability to complete the sale transaction due to its proven inability to obtain financing is an 'inability' within the meaning of s 57(f)(iv) of the Act unless the word 'inability' is defined to expressly exclude such a situation. One needs only to look at what that section said. Nothing is to be read in, nothing is to be implied

(*Cape Brandy Syndicate v IRC*). The only safe rule is to look at the words of the enactment and see what is the intention expressed by those words (*Coltness Iron Co v Black*).

[25] The words 'any person' in s 57(f)(iv) of the Act is wide enough to include the party to the instrument, which is the appellant in our case. There is no justification to interpret the word 'any person' as 'any other person'. That was not the intention of the legislature. There was no difficulty for the legislature to use the words 'any other person' instead of 'any person' if that was what it was meant to be.

[26] It must be noted that the memorandum of transfer in this case is endorsed by the collector with the words:

> Di setem dengan sempurna di bawah sek. 36 Butiran 32(a) Jadual Pertama.

What it means is that the memorandum of transfer is stamped under s 36 item 32(a) of the First Schedule. Item 32(a) of the First Schedule states:

> 32 CONVEYANCE, ASSIGNMENT, TRANSFER OR ABSOLUTE BILL OF SALE —
>
> (a) On sale of any property (except stock, shares, marketable securities and accounts receivables or book debts of the kind mentioned in paragraph (c)).

[27] What does 'conveyance on sale' mean? The term is defined in s 2 of the Act. It 'includes every instrument whereby any property, or any estate or interest in any property, upon the sale thereof is transferred to or vested in a purchaser or any other person on his behalf or by his direction'. The said memorandum of transfer is the relevant 'conveyance on sale' in our case.

[28] The definition of 'conveyance on sale' in the Act is similar to the definition of 'conveyance on sale' in s 70 of the Stamp Act 1870 (UK). It states that the term, 'includes every instrument and every decree or order of any court or of any commissioners, whereby any property upon the sale thereof is legally or equitably transferred to or vested in the purchaser or any other person on his behalf or by his direction'. The English Court of Appeal in *The Commissioners of Inland Revenue v G Angus & C, The Same v J Lewis and Sons* [1889] XXlll QBD 579 made it clear that s 70 of the UK Stamp Act 1870 did not strike at every instrument of sale and purchase. The taxation is confined to the instrument whereby the property on sale is legally or equitably transferred. Lord Esher MR at p 589 said:

> The first thing to be noticed is, that the thing which is made liable to the duty is an 'instrument'. If a contract of purchase and sale, or a conveyance by way of purchase and sale, can be, or is, carried out without an instrument, the case is not within the

section, and no tax is imposed. It is not the transaction of purchase and sale which is struck at; it is the instrument whereby the purchase and sale are effected which is struck at. And if anyone can carry through a purchase and sale without an instrument, then the legislature have not reached that transaction. The next thing is that it is not every instrument which may be brought into being in the course of a transaction of purchase and sale which is struck at. It is the instrument 'whereby any property upon the sale thereof is legally or equitably transferred'. The taxation is confined to the instrument whereby the property is transferred. The transfer must be made by the instrument. If a transfer requires something more than an instrument to carry it through, then the transaction is not struck at, and the instrument is not struck at because the property is not transferred by it.

[29] Now, is the memorandum of transfer in our case capable of transferring or vesting the property in the purchaser? The answer is 'No'. The intended purpose of the memorandum of transfer, that is to transfer or vest the property in the purchaser had failed due to the appellant's inability to pay the balance purchase price resulting in the termination of the agreement. There was therefore no conveyance on sale within the meaning of s 2 of the Act. Generally, the liability to pay stamp duty under the Act arises at the time of or before execution of the instrument: see s 41 of the Act; *Navaradnam v Suppiah Chettiar* [1973] 1 MLJ 173. The Act however empowers the collector to give allowance is respect of spoiled stamps under certain circumstances. This is provided for in s 57 of the Act. On the facts before us, we are of the view that the appellant's case falls squarely within s 57(f)(iv) of the Act. Thus, it is entitled to a full refund of the stamp duty paid on the said memorandum of transfer. It was submitted on behalf of the respondents that the principle that in a case of ambiguity a taxing statute should be construed in favour of taxpayer does not apply to a provision giving a taxpayer relief from a section imposing liability: see *Littman v Barron (Inspector of Taxes)* [1951] 2 All ER 393. In our view, the wording of s 57(f)(iv) of the Act is clear and does not admit of any ambiguity.

[30] For the aforesaid reasons we allowed the appellant's appeal with cost and ordered that the amount of stamp duty paid on the memorandum of transfer be refunded to the appellant. My learned sister Zaleha Zahari JCA had seen this judgment in draft and expressed her agreement with it.

[31] Lastly, it is necessary to state that this is a majority decision. My learned brother Mohd Hishamudin Yunus JCA had at the outset of the appeal held the view that the appeal was incompetent as no prior leave was obtained by the appellant to bring this appeal. Learned counsel for the appellant had, in response to my learned brother's query submitted that leave was not necessary as this was an application for an order of certiorari to quash the decision of the collector and for an order of mandamus to compel the collector to refund the stamp duty paid on the memorandum of transfer which could not be carried

out. He also pointed out that under the Practice Direction No 1 of 2008 leave is not required in respect of an application for an order of certiorari. We asked learned counsel for the respondents whether he was raising any preliminary objection. He confirmed that he was not making an issue out of it. We were therefore of the view that the question of prior leave was a non-issue and proceeded to hear the appeal on its merits.

Mohd Hishamudin JCA (dissenting):

[32] This is an appeal against the decision of the High Court of Kuala Lumpur (Appellate and Special Powers Division) of 5 November 2009.

[33] On 5 November 2009 the High Court of Kuala Lumpur (Appellate and Special Powers Division) had dismissed the appellant's application for a writ of certiorari pursuant to O 53 of the Rules of the High Court 1980 ('RHC') to quash the decision of the Deputy Collector of Stamp Duty and/or the Director General of Inland Revenue (the respondents) made on 23 July 2008 rejecting the appellant's application for a refund of stamp duty of RM78,600 paid by the appellant on 13 September 2007 in respect of a sale and purchase agreement.

[34] It is the contention of the appellant that it is entitled to a refund of the stamp duty paid as the sale transaction was not able to be completed by the appellant as it was unable to obtain a bank loan to finance the purchase of the property in question. The appellant relies on ss 57(f)(iii) and (iv) of the Stamp Act 1949.

[35] At the commencement of the hearing of this appeal, on our own motion, we directed the parties to submit before us on the preliminary issue as to whether or not prior leave of the Court of Appeal pursuant to s 68(1)(a) of the Courts of Judicature Act 1964 ('CJA') was required for the purpose of the present appeal, considering that the stamp duty imposed by the collector on the appellant was only RM78,600, that is to say, a sum way below RM250,000.

[36] Section 68(1)(a) of the CJA provides:

> Non-appealable matters —
>
> 68 (1) No appeal shall be brought to the Court of Appeal in any of the following cases:
>
> (a) When the amount or value of the subject-matter of the claim (exclusive of interest) is less than two hundred and fifty thousand ringgit, except with the leave of the Court of Appeal;

[37] It is not disputed that no prior leave had been obtained by the appellant.

[38] Learned counsel for both sides informed this court that they needed time to submit on the matter. Accordingly we adjourned the hearing to the following day, that is, to 9 February 2011.

[39] On the following day, learned counsel of both sides submitted that no leave was required for the purpose of the appeal by reason of the fact that the application of the appellant before the High Court was for a writ of certiorari to quash the decision of the respondents, and the appeal of the appellant to this court is against the refusal of the High Court to issue a writ of certiorari. It is the contention of both counsel that where the appeal to the Court of Appeal is in respect of a dismissal of an application for a writ of certiorari, leave under s 68(1)(a) of the CJA is not required. Both learned counsel rely on the following Practice Directions:

(1) Arahan Amalan Mahkamah Rayuan No 2 Tahun 1996; and

(2) Arahan Amalan Mahkamah Rayuan No 1 Tahun 2008.

[40] The Practice Direction of the Court of Appeal of 1996 provides:

> PERMOHONAN KEBENARAN UNTUK MERAYU KE MAHKAMAH RAYUAN—
>
> Adalah didapati sehingga kini ada di antara peguam-peguam yang masih samar-samar sama ada sesuatu kes itu memerlukan terlebih dahulu kebenaran Mahkamah Rayuan sebelum notis rayuan boleh difailkan dalam kes-kes yang tidak ada kaitan dengan amaun atau nilai yang tertentu.
>
> Maka dengan ini, YAA Presiden Mahkamah Rayuan membuat garis panduan bahawa dalam perkara-perkara seperti berikut kebenaran tidaklah diperlukan:
>
> (i) Certiorari — berkaitan dengan mana-mana rayuan yang melibatkan keputusan Mahkamah Perusahaan, keputusan Lembaga Tatatertib atau mana-mana badan yang menjalankan fungsi "quasi-judicial" yang melibatkan prinsip keadilan semulajadi (natural justice).
>
> (ii) Deklarasi — untuk mengisytiharkan bahawa sesuatu pemberian lessen, perbuatan, peninggalan atau keputusan sesuatu badan atau mana-mana yang diberi kuasa oleh undang-undang adalah tidak sah dan terbatal.
>
> (iii) Injunksi.
>
> (iv) Petisyen penggulungan syarikat — kecuali permohonan yang dibuat di bawah sub-ss 218 (e) dan (g)(i) Akta Syarikat 1965 yang melibatkan jumlah hutang kurang dari RM250,000.00.
>
> (v) Prosiding bankrupsi.
>
> (vi) Perkara-perkara berkaitan dengan prosiding hal ehwal suami isteri di bawah Akta Membaharui Undang-Undang (Perkahwinan dan Perceraian) 1976.

[41] The Practice Direction of the Court of Appeal of 2008 provides: A

(3) PERKARA-PERKARA YANG TIDAK PERLU KEBENARAN MERAYU

Kebenaran merayu tidak perlu bagi perkara-perkara berikut:

(a) *Certiorari* — berkaitan dengan mana-mana rayuan yang melibatkan keputusan Mahkamah Perusahaan, keputusan Lembaga Tatatertib atau mana-mana badan yang menjalankan fungsi 'quasi-judicial' yang melibatkan prinsip keadilan semulajadi (natural justice). B

(b) *Deklarasi* — untuk mengisytiharkan bahawa sesuatu pemberian lesen, perbuatan, peninggalan atau keputusan sesuatu badan atau mana-mana orang yang diberi kuasa oleh undang-undang adalah tidak sah dan terbatal. C

(c) *Injunksi*. D

(d) *Petisyen penggulungan syarikat* — kecuali permohonan yang dibuat di bawah seksyen 218(1)(e) dan seksyen 218(1)(g)(i) Akta Syarikat 1965 yang melibatkan jumlah hutang kurang dari RM250.000. E

(e) *Prosiding kebankrapan*.

(f) Perkara-perkara berkaitan dengan *prosiding hal ehwal suami isteri* di bawah Akta Membaharui Undang-Undang (Perkahwinan dan Perceraian) 1976. F

(g) Penghakiman untuk *gantirugi jumlah tak tertentu* (unliquidated damages/unliquidated amount).

[42] The majority of the panel (Zaleha Zahari and Abu Samah Nordin JJCA) after hearing submissions on the preliminary issue ruled that no prior leave under s 68(1)(a) of the CJA leave was required for the purpose of the appellant's appeal. G

[43] I, however, on my part, took a different view: I held that, based on judicial precedents, prior leave was required (see *Lam Kong Co Ltd v Thong Guan Co Pte Ltd* [2000] 4 MLJ 1; and *Harcharan Singh s/o Sohan Singh v Ranjit Kaur d/o S Gean Singh* [2010] 2 MLJ 479). I took the position that the subject-matter of the appeal was the value of the stamp duty imposed by the collector and that is RM78,600, and this amount was well below RM250,000. Section 68(1)(a) of the CJA does not provide for an exception in cases of certiorari. Since leave to appeal had not been obtained by the appellant, the appeal was therefore incompetent, and accordingly, I dismissed the appeal (with costs) solely on this threshold ground. I am of the view that the two Practice Directions are mere guidelines and should be interpreted as being H I

subject to the CJA, an Act of Parliament, a higher law. (The majority of the panel having ruled that prior leave was not required proceeded to hear the substantive appeal and made a decision allowing the appeal on 18 February 2011.)

[44] Hence it is of no surprise then that in *Lam Kong* it was held by the Federal Court that item (ii) of the 1996 Practice Direction applies only to declarations respecting subject matters that have no value attached to them or those with values that cannot be quantified. The Court of Appeal adopted a similar stand in *Harcharan Singh*. In my judgment, the same principle should apply to the present case. The items pertaining to cases of certiorari in both the Practice Directions are meant to apply only to certiorari cases respecting subject-matters that have no value attached to them or those with values that cannot be quantified. Although the present appeal concerns an application for a writ of certiorari, however, there is a value attached to the application, that value being the value of the stamp duty imposed on the appellant by the collector, that is, RM78,600. This stamp duty of RM78,600 is *actually* the subject-matter of the appeal. I am unable to find any valid reason to justify not applying the same principle (that has been applied to cases of declaration) to cases of certiorari.

[45] For the sake of completeness I wish to refer to the recent unreported Court of Appeal case of *Shell Malaysia Trading Sdn Bhd v Collector of Stamp Duty, Penang* [2009] 1 LNS 1769. Although the facts in that case do not involve certiorari but an appeal to the High Court by a special procedure known as 'case stated', nonetheless, I think the case is of some relevance to the present appeal. In that case, by a notice of assessment the collector of stamp duty (the respondent) notified the appellant (Shell Malaysia) that the stamp duty chargeable was RM87,542, charged pursuant to item 49(b) of the First Schedule of the Stamp Act 1949. The appellant was aggrieved by the assessment contending that the sum of RM 2,837,215.00 payable under the sub-lease agreement was 'rental' and not 'premium' and therefore the stamp duty should be chargeable under item 49(a) (rent) of the First Schedule of the Stamp Act, and not under item 49(b) (premium) of the same. Had the charge been imposed under item 49(a) of the First Schedule of the Stamp Act, then the stamp duty payable would have been lower. The appellant appealed to the High Court by way of a case stated pursuant to s 39(1) of the Stamp Act. This provision states:

> Appeal to High Court —
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> 39
>
> (1) Any person who is dissatisfied with the assessment of the Collector may, within twenty-one days after the date of the assessment and upon payment of duty in conformity therewith, appeal against the assessment to the High Court, and may

for that purpose require the Collector to state and sign a case, setting forth the question upon which his opinion is required, and the decision made by him. A

(2) The Collector shall thereupon state and sign a case and deliver to the same to the person by whom it is required, and the case may, within seven days thereafter or within such further time as the Court may allow, be set down by him for hearing. B

[46] The questions submitted by the collector by way of a case stated for the opinion of the High Court were:

(a) Whether the sub-lease agreement dated 6 June 1995 presented for adjudication is liable to duty as assessed by the collector of stamp duty? C

(b) If not, to what duty is it liable?

[47] The High Court dismissed the appellant's appeal and upheld the respondent's assessment of the stamp duty payable on the sub-lease agreement. Dissatisfied with the decision of the High Court, the appellant appealed to this court. At the commencement of the hearing of the appeal, the Court of Appeal on its own motion, directed the parties to submit on the preliminary issue as to whether or not prior leave of the Court of Appeal pursuant to s 68(1)(a) of the Courts of Judicature Act 1964 ('CJA') was required for the purpose of the appeal, considering that the stamp duty imposed by the collector on the appellant was only RM87,542, that is to say, a sum way below RM250,000. D E

[48] The appellant in that case submitted that no prior leave of the Court of Appeal pursuant to s 68(1)(a) of the CJA was required as the matter came before the High Court by way of a case stated pursuant to s 39 of the Stamp Duty Act and hence there was no 'claim' made before the High Court. The appellant argued that what was before the High Court was merely the two questions posed. Such an argument did not impress the Court of Appeal. The court ruled that prior leave of the Court of Appeal ought to have been obtained by the appellant. The court held: F G

> With respect, we are unable to agree with the submissions of both learned counsel on the issue regarding leave. In our view, what moved the appellant to appeal to the High Court was the imposition by the collector of a stamp duty of RM87,542. Therefore, in our view, this must be taken to be the subject-matter of the appeal before the High Court as well as the subject-matter of the appeal before us. This amount of RM87,542 is less than RM250,000. Therefore, prior leave of the Court of Appeal is required by virtue of s 68(1)(a) of the CJA. Since there was no prior leave, the appeal was therefore incompetent and accordingly we dismissed it. H I

[49] Appeal dismissed with costs.

Appeal allowed with costs.

Reported by Ashok Kumar